

NO. 141 Original

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF SEPTEMBER 22, 2021,
REMOTE HEARING BEFORE HONORABLE MICHAEL A. MELLOY,
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401,
beginning at 11:02 a.m.

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1 **JUDGE MELLOY:** This is Judge Melloy.
2 Should we get started, everyone? Let me start as we
3 usually do. This is the matter of United States
4 Supreme Court Original No. 141, Texas versus New
5 Mexico and Colorado with United States as intervenor.
6 Let me start by asking for the appearances.
7 Mr. Somach, are you here?

8 **MR. SOMACH:** Yes, Your Honor. This is
9 Stuart Somach, counsel of record for the State of
10 Texas. With me from my office is Theresa Barfield,
11 Sarah Klahn, Francis Goldsberry, Robert Hoffman. From
12 the Texas Attorney General's Office, Priscilla
13 Hubenak, and the -- the engineer advisor to the Texas
14 Rio Grande Commissioner, Suzy Valentine.

15 **JUDGE MELLOY:** All right. Mr. Wechsler?

16 **MR. WECHSLER:** Good morning, Your Honor.
17 Jeff Wechsler from Montgomery & Andrews for the State
18 of New Mexico. We also have Cholla Khoury, Zachary
19 Ogaz from the Office of the Attorney General; Susan
20 Barela from Robles Rael & Anaya; Lisa Thompson and
21 Michael Kopp from Trout Raley; John Draper and Corinne
22 Atton from Draper & Draper; the state engineer and
23 Compact commissioner, John D'Antonio; the ISC
24 director, Rolf Schmidt-Petersen; Greg Ridgley, the
25 general counsel for the OSE; Arianne Singer, general

1 counsel for Interstate Stream Commission; Shelly
2 Dalrymple, and April Ferguson.

3 **JUDGE MELLOY:** Mr. Wechsler, I don't
4 know if it's my setup here or your microphone, but I'm
5 having trouble hearing you very well. The volume is
6 pretty low. I don't know if anybody else is having
7 the same problem, but if you could speak up or maybe
8 get a little closer to the microphone, I appreciate
9 it.

10 Mr. -- Mr. Wallace?

11 **MR. WALLACE:** Yes, good morning, Your
12 Honor. This is Chad Wallace for the State of
13 Colorado. Also with us this morning from the Colorado
14 Attorney General's Office are Preston Hartman, Scott
15 Steinbrecher, and Danny Rheiner.

16 **JUDGE MELLOY:** All right. And
17 Mr. Dubois?

18 **MR. DUBOIS:** Good morning, Your Honor,
19 James Dubois for the United States. Also on from the
20 Department of Justice are Lee Leininger, Judith
21 Coleman, and Jennifer Najjar; from the Solicitor's
22 Office, Chris Rich and Shelly Randel; and Ian Ferguson
23 from Reclamation.

24 **JUDGE MELLOY:** Albuquerque Bernalillo
25 County Water Authority?

1 **MR. BROCKMANN:** Good morning, Your
2 Honor. This is Jim Brockmann on behalf of the
3 Albuquerque Bernalillo County Water Utility Authority.

4 **JUDGE MELLOY:** City of El Paso?

5 **MR. CAROOM:** Good morning, Your Honor.
6 Doug Caroom for the City of El Paso.

7 **JUDGE MELLOY:** City of Las Cruces?

8 **MR. STEIN:** Good morning, Your Honor.
9 This is Jay Stein for the City of Las Cruces, and also
10 joining is Delilah Walsh, the director of Las Cruces
11 utilities, and Adrienne Widmer, the deputy director.

12 **JUDGE MELLOY:** El Paso County Water
13 Improvement District No. 1?

14 **MS. O'BRIEN:** Good morning, Your Honor.
15 Maria O'Brien for El Paso County Water Improvement
16 District No. 1. Renea Hicks is also on, as well as
17 Dr. Al Blair, the district engineer.

18 **JUDGE MELLOY:** Elephant Butte Irrigation
19 District?

20 **MS. BARNCASTLE:** Good morning, Your
21 Honor. Samantha Barncastle for the Elephant Butte
22 Irrigation District, and with me today is Dr. Phil
23 King, our consultant.

24 **JUDGE MELLOY:** Hudspeth County
25 Conservation and Reclamation District No. 1?

1 **MR. MILLER:** Yes, good morning, Your
2 Honor. This is Drew Miller on behalf of the Hudspeth
3 District.

4 **JUDGE MELLOY:** Okay. New Mexico Pecan
5 Growers?

6 **MS. DAVIDSON:** Good morning, Your Honor.
7 Tessa Davidson on behalf of New Mexico Pecan Growers.

8 **JUDGE MELLOY:** New Mexico State
9 University?

10 **MR. UTTON:** Good morning, Your Honor.
11 This is John Utton on behalf of the University.

12 **JUDGE MELLOY:** Southern Rio Grande
13 Diversified Crop Farmers Association? Mr. Olsen, are
14 you on? You're muted, if you are. I see your name,
15 but I don't see -- well, I'll assume you're there.
16 All right. Did I miss anyone?

17 (No response.)

18 **JUDGE MELLOY:** Before we get started, I
19 wanted to ask, Heather, are you doing realtime?

20 **THE REPORTER:** I'm not currently, no.

21 **JUDGE MELLOY:** Okay. That's why it
22 isn't working. Okay. That's fine. I was just going
23 to -- if you were, I was going to just see how it
24 works so we'll not worry about that then.

25 All right. Let's talk about some of the

1 mechanics of the trial that's scheduled to start a
2 week from Monday. I know -- I know some of you have
3 been in contact with Worldwide Reporting so some of
4 what I'm about to say, I think you've already talked
5 about, but I want to just kind of go over what we have
6 talked about with Worldwide, and we have a couple of
7 the Worldwide people, Pete and Brandon, are on so if I
8 misstate anything or we need to ask them any
9 questions, we can get some clarification. We had
10 talked initially about the fact that we would have two
11 sort of classes of participants. That would be people
12 who would be active participants who would have the
13 ability to be seen and heard, and then we'd also have
14 observers, those for whom Worldwide would not allow
15 the cameras to either be operable or the mics to be
16 operable. I understand, however, that since we've
17 switched to this virtual format, that that is not
18 going to work, and the reason being that the parties
19 would like to have the ability to have breakout rooms,
20 I presume one for Texas, one for United States, and so
21 on, and if we want to have the ability to have
22 breakout rooms, everybody has to be a participant, and
23 so -- so everyone will have the ability to speak and
24 be heard, although it certainly isn't my intention
25 that everybody be heard or -- or speak, and what --

1 what will happen is when you log on in the morning for
2 the trial, everybody's camera and microphone will be
3 muted. I mean, the microphone will be muted. The
4 camera would be off. And only those people who were
5 going to be participating in the trial will then turn
6 their camera and microphone on, and what I am
7 envisioning doing is at the beginning of the
8 proceedings each day, I don't anticipate doing a roll
9 call like we just did. I'm just going to ask for the
10 names of the people for each of the parties who will
11 be participating in that day's proceedings. You know,
12 just like a regular trial, if we are in court, if we
13 have three people at counsel table, normally we have
14 one person designated to do the cross-examination, if
15 you're not the person examining, and also to make
16 objections, and it would be my intention that it would
17 be the same with this proceeding. That is, we won't
18 be tag teaming on objections and -- and so each
19 morning, I will be asking who from the State of Texas,
20 who from the State of New Mexico, so on, will be
21 participating for that day's proceedings, who will be
22 doing the objecting, and who will be doing the
23 cross-examination, and only their cameras will be on.
24 Everybody else will be off. My camera will be on, the
25 witness camera on, and obviously the attorney doing

1 the examination will be on. It's also my anticipation
2 that everybody will be muted with the exception of the
3 -- of the witness and the examining attorney. If you
4 have to make an objection, you're going to have to hit
5 the spacebar or use some other device if you have it
6 on your microphone, but in talking with Heather and
7 the people at Worldwide, I think we all agree that the
8 less background noise, the better, in terms of sound
9 quality. So any question or problems with any of
10 that? Okay. So basically, there ought to be six
11 cameras on, mine, the witness', and the four
12 attorneys' representing the four parties.

13 The other thing is the Chat function.
14 It's in the order, and if you're going to use the Chat
15 function -- well, I think we'll actually have two
16 options on the Chat function. One, it will be either
17 you chat with everybody, which may be a substantive
18 issue dealing with the testimony, or you will be able
19 to chat with the host, which will be the Worldwide
20 folks, and that -- that would be related strictly just
21 to technical issues. So if you're having some
22 technical issue and want to have a chat with them,
23 that's fine, but anything else will be the whole group
24 and so there will be no private chatting between
25 attorneys. Obviously, you can use other -- you know,

1 other e-mail or -- or other programs if you want to
2 chat amongst yourselves, but through this function,
3 that will be the only use of the Chat function.

4 We do envision setting up breakout
5 rooms, and we'll probably have some preassigned, and
6 then, also, if we need them, as the trial goes on, we
7 can add some more or create some special breakout
8 rooms for a specific session. I should add that
9 everything I'm talking about here today is subject to
10 modification. As we go through this, it may turn out
11 that we -- we may have other -- we may have to make
12 other modifications, but this is where we're going to
13 start. As I've indicated in the order, I'm going to
14 leave it up to the attorneys to designate who among
15 their group will have the right to observe the trial.
16 We're going to limit that to other members of their
17 firm, including the paralegals and technical people.
18 Expert witnesses and representatives of client
19 representatives. What I'm going to ask that you do
20 today is after we finish this session, each of you
21 will be receiving an e-mail from Worldwide with a
22 dedicated e-mail address just for this trial, and
23 we're -- I'm asking that you send as soon as possible,
24 preferably today, this afternoon, a list of who you
25 want to be a participant on the proceeding with that

1 person's e-mail address. That will go to the e-mail
2 -- that will go to the Worldwide e-mail that you'll be
3 receiving this afternoon. Once -- once Worldwide
4 receives that information, they're going to send an
5 invitation to each of those people at the e-mail
6 address you designate, and they'll be asked to
7 register and the registration will be pretty brief.
8 It's going to say basically name, e-mail address, what
9 your role is in the -- in the proceeding, expert
10 witness for Texas, water commissioner for New Mexico,
11 whatever attorney and the party that you're
12 representing or affiliated with, and then finally,
13 they may ask you some technical questions about how
14 you're going to be viewing, because as I understand
15 it, and I'm not going to get in the weeds of the
16 technology, depending on whether you're using an
17 Ethernet connection versus a wireless connection, it
18 may make some difference so they may be asking some
19 technical questions on how you're going to connect.
20 But once they receive that registration back, you will
21 then receive an invitation for the -- for the
22 proceeding. They anticipate that they'll be sending
23 out an invitation every Thursday for the following
24 week, and that the invitation will be good for the
25 whole week, so it will be the same log-in information

1 every day for that week.

2 As far as the witnesses, our concern --
3 we're going to ask that when we start the testimony,
4 that we identify everyone who's in the room with the
5 witness. We're going to ask if the witness has any
6 materials that they're going to be using during the
7 testimony and what those materials are, and we're
8 going to indicate that the only window they can have
9 open is the Zoom window, which will show, of course,
10 the attorney doing the examination. I notice in one
11 of the letters I received in the last couple days,
12 they wanted to make a request that the witness will
13 not have access to the realtime and that the witness
14 would have no access to any messaging apps or text
15 capability. Is there any objection to that as far as
16 the witnesses are concerned? Anybody have a problem
17 with any of that?

18 (No response.)

19 **JUDGE MELLOY:** I think that pretty well
20 covers the issues dealing with how the proceedings are
21 going to work once we get into the trial. I would
22 like to do a -- I guess for want of a better term, a
23 dress rehearsal next week, where we would actually do
24 all this the same as if we were doing the trial, and I
25 would propose --- would a week from today work for

1 that? Is that -- is that available? Does that date
2 work for everybody?

3 **MR. SOMACH:** Works for Texas, Your
4 Honor.

5 **JUDGE MELLOY:** Pardon me?

6 **MR. SOMACH:** It works for Texas, Your
7 Honor.

8 **JUDGE MELLOY:** If anybody doesn't work
9 for, speak or that'll be -- okay. 29th. We'll do it
10 the same time, 11:00 a.m. Central.

11 All right. Okay. Any questions about
12 those logistics? Anything I haven't covered that you
13 have a question about? Anything that Heather has that
14 she thinks we should know about or the people from
15 Worldwide? Anyone?

16 (No response.)

17 **JUDGE MELLOY:** All right. If not, then
18 let's get into some of the more substantive issues
19 that have been raised.

20 **THE REPORTER:** Judge Melloy, this is
21 Heather.

22 **JUDGE MELLOY:** Yes.

23 **THE REPORTER:** I just wanted to pause
24 real quick and say if you'd like me to turn the
25 realtime on, if you want to pause for a quick second,

1 I can do that. I just need my hands free to do it.
2 Otherwise, we can test later if you'd like. It's up
3 to you.

4 **JUDGE MELLOY:** We can do -- we'll leave
5 that for next week. We'll do that as part of the
6 dress rehearsal.

7 **THE REPORTER:** Okay. Sounds good.

8 **JUDGE MELLOY:** Okay. Anything else
9 anybody has about any of that?

10 (No response.)

11 **JUDGE MELLOY:** Let me ask where we are
12 with the witness lists and exhibit list. Now, the
13 witness lists are going to be updated tomorrow; is
14 that correct? Anybody -- is that everyone's
15 understanding or anybody not understand that that way?
16 Can you hold on just a second? I'm having a technical
17 issue I want to check with somebody on.

18 **VIRTUAL MONITOR:** Got a couple of people
19 saying they can't un-mute, so let me deal with that,
20 too. That should get it.

21 **MR. DUBOIS:** Yeah. Looks like Jeff and
22 I are both back on.

23 **MR. WECHSLER:** Yeah. Is my sound better
24 now?

25 **VIRTUAL MONITOR:** Yes.

1 **MR. WECHSLER:** Your Honor, I do have
2 just a quick word about the mechanics, if I may.

3 **JUDGE MELLOY:** Go ahead.

4 **MR. WECHSLER:** I just want to alert you
5 and Zoom, as well, to how New Mexico intends to be
6 conducting the trial so that you are aware, and then I
7 do have one question. So the way New Mexico is
8 intending to conduct the trial is primarily from my
9 office, so we'll be -- the attorney will primarily be
10 in a conference room so it'll be labeled New Mexico
11 attorney or something similar, and likewise, our
12 witnesses will primarily be in a single conference
13 room by themselves in our office, as well, listed as
14 New Mexico witness. We can, of course, change that
15 with each changing witness, but wanted to give you a
16 head's up that that's how we intend to proceed. As
17 for my question, it's how the witnesses themselves
18 will be invited, and part of this comes from confusion
19 that I should have caught in the proposed order that
20 we did. That language eventually got into the order
21 regarding the whole trial protocols, and that is in
22 Section 4B of that order, it says that, "Attorneys
23 should not attempt to share a connection with a
24 witness." But then in Section 4.E.1, it says, "It is
25 the responsibility of the attorney offering the

1 witness to ensure that the witness has the link to the
2 proceedings," which seemed inconsistent with me, so I
3 just thought I would check with you and Worldwide as
4 to how exactly those witness invitations are going to
5 occur.

6 **JUDGE MELLOY:** Well, we can -- we can
7 have Worldwide send an invite to the witness.

8 **VIRTUAL MONITOR:** Yes. I would suggest
9 the witness register, as well, just like everyone
10 else.

11 **JUDGE MELLOY:** But I also assumed, and
12 maybe I shouldn't have assumed this, that the witness
13 would not be in a room all by himself or herself, that
14 usually there's going to be an attorney in the room
15 with them. What's your -- what's your understanding,
16 Mr. Wechsler?

17 **MR. WECHSLER:** Yeah. We actually had a
18 discussion about that as we were developing the
19 protocols. I think, my understanding is primarily,
20 there will not be an attorney in the room with the
21 witness. I think some witnesses will be actually
22 appearing from different cities as the attorney who's
23 presenting them, and so certainly from our perspective
24 at our office, that witness will be in a room by him
25 or herself, and the attorney will be in a separate

1 room.

2 **JUDGE MELLOY:** Okay. Well, that's fine.
3 I just assumed that in all likelihood, the witness
4 would be at the attorney office in the conference room
5 with at least one other attorney, but that -- that's
6 fine certainly if they're not. And, also, I should
7 add that the invite from Worldwide will be for one
8 person -- for one connection only, so you -- once you
9 make a connection with your invite, no other person
10 can do it. So if you're going to have other staff
11 people, paralegals, technical people who want to make
12 a connection, they're going to have to each have their
13 own invite, and as I understand it, if you switch
14 computers, you're going to have to let Worldwide know
15 that so they can send you a second invite during the
16 day.

17 Any other questions about that?

18 (No response.)

19 **JUDGE MELLOY:** All right. Then getting
20 back to the witness list, the witness list should be
21 disclosed tomorrow. What about exhibits? Colorado
22 submitted an updated exhibit list in which they
23 identified all the A exhibits, the B and C exhibits,
24 and as to the B and C the basis for the objection.
25 Are we going to get something similar from the other

1 parties or where are we on that issue? I guess I'll
2 start with Mr. Somach.

3 **MR. SOMACH:** Ms. Barfield can --

4 **JUDGE MELLOY:** Ms. Barfield?

5 **MS. BARFIELD:** Yes, Your Honor. So in
6 terms of the A, B, C objections, with the exception of
7 authenticity, which the parties have engaged in prior
8 to today, we've encompassed those objections within
9 the -- the lists that are going to be circulated five
10 days before a witness testifies. So the parties have
11 agreed, and I think Your Honor approved this maybe at
12 the last status conference. So five days before,
13 we'll exchange or circulate the list of exhibits
14 proposed to be used for a specific witness, and then
15 there's a process for objections that goes into play,
16 and so the parties will have an opportunity to make
17 those A, B, C objections within a couple of days.
18 We'll meet and confer with the goal to resolve any
19 remaining objections before the witness gets on the
20 stand and only bring to the Court any disputes that
21 are unresolved at that time.

22 **JUDGE MELLOY:** All right. Well, so you
23 do not anticipate that y'all have any A exhibits at
24 the start of trial like Colorado has?

25 **MS. BARFIELD:** That's correct.

1 **JUDGE MELLOY:** Okay. And the other
2 party -- go ahead.

3 **MR. WECHSLER:** Your Honor, I would add,
4 just as a reminder, I think this issue was raised
5 during the July 15th order. New Mexico had requested
6 that we continue doing the A, B, and C objections in
7 advance so that you could have that information ahead
8 of trial. At that point, you said you wanted to wait
9 until you reviewed the motions in limine, and we never
10 revisited that issue. As to the -- the Category A
11 exhibits, I mean, I -- I think that all joint exhibits
12 are exhibits that are being proposed by all of the
13 parties. They certainly fit into that Category A. As
14 to Colorado exhibits, I think at this point, given the
15 stipulation, I just don't know that any of the parties
16 have given their non-authenticity objections to any
17 exhibits, other than joint exhibits.

18 **JUDGE MELLOY:** I'm sorry. Can you say
19 that again? What are you -- what are you saying about
20 the Colorado exhibits?

21 **MR. WECHSLER:** Well, I'm saying that at
22 -- at this point, none of the parties have evaluated
23 exhibits for any objections, other than authenticity,
24 and that includes Colorado exhibits, and so if
25 Colorado is intending to present an exhibit, as Ms.

1 Barfield indicated, I think it would go through that
2 five-day process, and the day before a witness is
3 presented, you'll be given, by the presenting party, a
4 list of all of the exhibits that one of the parties is
5 intending to or may offer through that witness, along
6 with whether or not there's any objections, and if
7 there are objections, the nature of those objections.

8 **JUDGE MELLOY:** Well, let -- see, I had
9 envisioned that once we started the trial, one of the
10 first orders of business would be admitting all the A
11 exhibits that any -- that either party had, and they
12 would be -- and at that point, they would still be in
13 electronic format, but once admitted -- and this is
14 one of the things I had as a note I wanted to get some
15 clarification on is how we are going to handle
16 exhibits, that once admitted, the exhibit would be
17 uploaded, as I understand it, to this file share
18 service box.com? Is that how you would envision it
19 being -- being done?

20 **MR. WECHSLER:** Yes, Your Honor.

21 **MS. BARFIELD:** That is correct.

22 **JUDGE MELLOY:** And then there may be
23 some exhibits that are admitted that -- that for one
24 reason or the other aren't necessarily going to be
25 used by a particular witness, and they would not

1 actually be printed and available for use by that
2 witness. I mean, as I understand it, only exhibits
3 that you're actually going to examine the witness
4 about will be printed and made available for that
5 witness. Am I -- am I misunderstanding this?

6 **MS. BARFIELD:** That is certainly Texas'
7 understanding, Your Honor.

8 **JUDGE MELLOY:** Well, do you understand
9 that there will be exhibits that may not necessarily
10 be used by a particular witness that may be put in
11 just for record purposes.

12 **MS. BARFIELD:** I think that some of the
13 -- or perhaps even the entire joint list could be
14 entered in that manner. The parties haven't actually
15 discussed that, whether or not we would jointly
16 propose that the joint list itself be admitted at the
17 beginning of trial in its entirety. We can certainly
18 discuss that, though.

19 **JUDGE MELLOY:** But do you envision,
20 other than the joint exhibits, that there might be
21 exhibits that you want admitted, again, as I say, for
22 record purposes without necessarily being used by a
23 specific witness?

24 **MS. BARFIELD:** For Texas, Your Honor,
25 not at this time. We will have -- we will have

1 witness-specific lists for each of our witnesses that
2 we will use at trial.

3 **JUDGE MELLOY:** So -- so we'll have
4 exhibits that are joint exhibits, and if we can get
5 those admitted at the beginning of the trial, they'll
6 be uploaded immediately to Box.com, right?

7 **MS. BARFIELD:** Yes.

8 **JUDGE MELLOY:** And then as you get ready
9 to put a witness on, you'll identify exhibits. They
10 will be printed, put in a notebook and identified as
11 A, B, or C, and if they're admitted, then they'll be
12 uploaded to Box.com; is that the way you understand
13 it?

14 **MS. BARFIELD:** Exactly. That's how we
15 envision it.

16 **JUDGE MELLOY:** Okay. Does anybody
17 understand it differently?

18 **MR. WECHSLER:** We understand that that
19 way, as well, Your Honor. I just want to alert you
20 that in order to avoid any potential problems, New
21 Mexico is mailing -- in fact, has already mailed to
22 you a full set of New Mexico exhibits printed, as well
23 as a full set of the joint exhibits so that you have
24 them. I don't want you to get caught off guard
25 because it's many boxes.

1 **JUDGE MELLOY:** Okay. Thank you. Then
2 how does one access the Box.com.

3 **MR. WECHSLER:** I don't know the answer.

4 **MS. BARFIELD:** I'm going to have
5 Mr. Dubois jump in on that question, Your Honor. We
6 don't have that information yet. Box.com is a
7 platform that typically the United States uses.

8 **JUDGE MELLOY:** Mr. Dubois?

9 **MR. DUBOIS:** You know, Your Honor, I'd
10 have to defer to my technical people on that, and I --
11 I can certainly have Mr. Allison talk about the
12 Box.com, but I hadn't -- I hadn't briefed myself on
13 that issue before this -- before this call, so I'm --
14 I'm incompetent to comment.

15 **JUDGE MELLOY:** All right. Well, could
16 you get that information and maybe send us a letter
17 with -- with that information? And, also, I would
18 like to know if there will be a record of who accesses
19 it and what they access. I don't think any of us want
20 to know what the other -- if -- if you're accessing
21 exhibits, I don't want to know who's accessing them,
22 and I don't want you to know what exhibits I'm
23 accessing necessarily, so I want to know if that --
24 what kind of record is kept of who accesses what.

25 **MR. DUBOIS:** We will report back on

1 that, Your Honor.

2 **JUDGE MELLOY:** Anybody have any other
3 questions about that particular facet of the trial or
4 -- or how that's going to work that you want
5 Mr. Dubois to research before we get back together?

6 (No response.)

7 **JUDGE MELLOY:** All right. Okay. New
8 Mexico has requested or has indicated it intends to
9 defer all cross-examination of Dr. King, and is it
10 Dr. Blair or Mr. Blair to the spring testimony. I had
11 kind of assumed you were probably going to do that,
12 Mr. Wechsler. Does anybody object to that?

13 **MR. SOMACH:** Your Honor, this is Stuart
14 Somach. Texas has no objection to that at all but
15 just wants to make certain, this goes to trial and
16 witness preparation, we want to make sure that, in
17 fact, that's the way it'll be, they'll reserve their
18 cross-examination until the spring, and then we won't
19 deal with cross-examination or even preparation of
20 witnesses for cross-examination this fall, we'll just
21 put it on, and then we'll wait until -- until the
22 spring for -- for cross-examination.

23 **JUDGE MELLOY:** All right. Okay. So I
24 think everybody's in agreement on that.

25 All right. What is the status of this

1 issue concerning the drone footage? Ms. Barfield, are
2 you the one who's going to speak to that or who wants
3 to talk about that?

4 **MS. BARFIELD:** That's actually going to
5 be Ms. Klahn for Texas.

6 **JUDGE MELLODY:** Okay.

7 **MS. KLAHN:** Good morning, Your Honor.
8 The status of the drone video is that the video has
9 been completed -- the work has been completed by the
10 drone group. The videos have been, I guess, kind of
11 clipped together into a 23-minute video, so that the
12 entire several hours of video is not what we're
13 proposing to show the Court, and we have made the
14 videos that we have to date available to the parties.
15 Today, we'll be disclosing the rest of the videos, and
16 the reason there was a break there, I think you may
17 recall on August 27th when we had the pretrial, we
18 reported that the plan was for the drone's pilots to
19 fly the remainder of the Compact area down to Fort
20 Quitman the following week, but Hurricane Ida hit in
21 New Orleans, and the drone pilot group has -- they all
22 have a day job with the energy company down there in
23 the New Orleans area and so they had a lot of work to
24 do the ten days after the hurricane in order to do
25 their regular job of flying the drones around to see

1 where -- where the catastrophes were. So -- so what
2 happened was early last week, they did finish. We
3 have the remainder of the video, and as I say, we're
4 going to make that available today.

5 **JUDGE MELLOY:** Are you able to address
6 the issues raised by Mr. Wechsler in his letter?

7 **MS. KLAHN:** I'd be happy to, Your Honor.
8 The drone video -- just to review, the drone video was
9 the replacement for the flyover. The flyover was
10 going to be videoed and transcribed for that matter.
11 There was going to be a court reporter in the plane.
12 We had an agreed-upon flight plan at the time that the
13 flight was pulled because of COVID, and we provided
14 that flight plan to the drone pilots, and we also
15 provided a diagram from New Mexico Exhibit, I think,
16 129 maybe. It's a 1998 report. It's just a
17 straight-line diagram of the Rio Grande system -- Rio
18 Grande project so that the drone pilots would be able
19 to identify the structures that are part of the Rio
20 Grande project. So the goal was to simply replicate,
21 to the extent possible, the flyover. So that's the
22 footage that we had, and what has happened is we've
23 created this shorter video that from the 300 -- the 30
24 videos and the other still photographs that are --
25 that have been made available that has a map next to

1 each of the drone flight videos. So, for example,
2 when you're at Caballo, there's a little map next to
3 it on the video page, and it shows you where you are
4 in relation to the rest of the system. We think it'll
5 be a very helpful demonstrative exhibit. We have
6 thought that that was the understanding all along,
7 that this would be a demonstrative exhibit, and we
8 anticipate introducing it through several witnesses
9 during the course of our case, just for the purpose
10 of, you know, it's a picture. It's a picture of
11 what's on the ground, and it's taken from the sky.
12 That's the difference, I guess, between the -- the
13 drone footage and the field trip that -- that people
14 went on. The idea that the exhibits are confusing and
15 redundant seems to conflict with selective and not
16 representative. I -- I believe that Mr. Wechsler's
17 objection on the drone footage being selective was
18 related to the fact that he -- he doesn't have -- no
19 one has, except until today, the -- the remaining
20 footage below EP1. So what -- as I just explained,
21 that got flown last week. We will add that into the
22 mix -- it is added into the mix. As far as the drone
23 exhibits being confusing and redundant, we really felt
24 like it was our obligation to disclose everything, and
25 if there's something in there that New Mexico wants to

1 use, they can. We're not planning to introduce all of
2 those exhibits, but we wanted to make them available
3 to the parties in the event that someone else wanted
4 to use it.

5 The last issue that Mr. Wechsler raises
6 is that the drone footage is not admissible. As I
7 understand his objection, it appears to be that it's
8 too late for this video per the deadlines of Rule 26,
9 but, I mean, the events that occasioned the video
10 didn't even happen until about six weeks ago. So all
11 in all -- well, we've also -- I should also say, this
12 isn't part of his objections, but we've also provided
13 the contact information to New Mexico for the folks
14 who were involved in the video. You know, they're
15 available for depositions if that's something that New
16 Mexico would like to do, and, you know, we look
17 forward to showing this to you.

18 **JUDGE MELLOY:** Well, let me ask this.

19 **MS. KLAHN:** Sure.

20 **JUDGE MELLOY:** You have the -- the drone
21 footage, which you say is how long, 18 minutes?

22 **MS. KLAHN:** The -- what we did was take
23 -- so each -- each place they flew, they flew multiple
24 places so they had a lot of different footage. What
25 we tried to do was stitch that together into a

1 cohesive, 23-minute movie, I'm going to call it.

2 JUDGE MELLOY: 23. Okay.

3 MS. KLAHN: It goes from north to south.

4 JUDGE MELLOY: So that you're planning
5 to use as a demonstrative exhibit, right?

6 MS. KLAHN: Correct.

7 JUDGE MELLOY: And then do you have
8 separate still photos that you want to use as numbered
9 and admitted exhibits?

10 MS. KLAHN: Well, at this point, I don't
11 know that we're going to use any of the still photos,
12 but that's not to say that somebody couldn't decide to
13 use them. For example, the United States might find
14 some of those still photos usable for the Bureau of
15 Reclamation witnesses that they're putting on.

16 JUDGE MELLOY: I guess I'm looking at
17 Mr. Wechsler's Paragraph 2C. There are 330 separate
18 drone exhibits, 30 photographs of Elephant Butte and
19 Caballo, 95 photographs of Fort Quitman gage. Are any
20 of those photographs something that you're intending
21 to admit at this time?

22 MS. KLAHN: Well, I guess -- I guess I'm
23 not sure if we are or not, if we're going to use any
24 of those still photographs. We haven't gotten that
25 far, I guess, with the photographs and the witnesses,

1 Your Honor.

2 JUDGE MELLOY: But you haven't -- I
3 guess what I'm getting at is at this point, not
4 numbering and proposing to admit 330 separate --

5 MS. KLAHN: Not today, no. No.

6 JUDGE MELLOY: So you have -- from this
7 drone flyover, you have both video that has been now
8 compressed into this 23-minute total video, and then
9 you have a number of separate individual photographs
10 --

11 MS. KLAHN: Correct.

12 JUDGE MELLOY: -- aerial photographs, I
13 assume?

14 MS. KLAHN: Correct.

15 JUDGE MELLOY: And you had disclosed
16 those aerial photographs to everybody, and at this
17 point, no one has made the decision that they're going
18 to use any of them or, if so, which ones; is that --

19 MS. KLAHN: Correct.

20 JUDGE MELLOY: Am I correctly
21 understanding it?

22 MS. KLAHN: Yes.

23 JUDGE MELLOY: Okay. What's your
24 position on all this, Mr. Wechsler?

25 MR. WECHSLER: Well, Your Honor, that

1 was very helpful to hear. Frankly, it would have been
2 very helpful to have heard that prior to the time the
3 contractor was contacted. As I understand, we
4 understand there's no actual written contract for what
5 instructions were given. Until today, I didn't
6 understand that those would be demonstrative exhibits,
7 to which we have no objection, as opposed to
8 evidentiary exhibits. It's puzzling to me that the
9 330 exhibits were listed on the -- the exhibit list
10 rather than simply disclosed as part of a supplemental
11 discovery, and I guess what I would ask if what Texas
12 and the U.S. are intending to do is use some of them
13 from demonstrative exhibits, they should be withdrawn
14 from the exhibit list. Demonstrative exhibits are
15 being dealt with separately, and they can certainly
16 use them that way, dealing with a single 23-minute
17 video or a discrete set of videos and pictures is
18 certainly a lot easier, and I -- I understand Ms.
19 Klahn's point about having a witness testify using
20 that as a demonstrative. Like I said, we have no
21 initial objection to that at all. So I guess those --
22 those are my thoughts.

23 **JUDGE MELLOY:** Well, I think at this
24 point, there's really not much to do until -- until
25 somebody attempts to admit something as an exhibit,

1 and as I understand it, there's no real objection to
2 the video as a demonstrative exhibit, so until there's
3 an issue I have to rule on, I guess we'll -- we'll
4 leave it at that.

5 The -- the other point that you had
6 raised in your letter, Mr. Wechsler, was about
7 subpoenas, whether it would be necessary to subpoena
8 Mr. Esslinger and Mr. Reyes.

9 **MR. SOMACH:** Your Honor, we can clarify.
10 We're going to put them on as -- as witnesses. They
11 were on, I think, the may-call list, but we're going
12 to put them on the will-call list, along with
13 Mr. Rios, and if -- if that helps at all. You know,
14 we'll put them on, and that should take care of the
15 need to subpoena them.

16 **JUDGE MELLODY:** Are there any witnesses
17 that are going to need to be subpoenaed from -- any
18 party think they have a witness they need to subpoena?

19 **MR. WECHSLER:** Yes, Your Honor. So --
20 so we do understand that subpoenas will be necessary
21 for Mr. Drusina and -- I'm just looking for my list
22 here -- oh, and -- and for Mr. Chavez from Hudspeth,
23 who you had the opportunity to meet. So we have
24 worked out the details of that. Our intention is to
25 be providing a notice. We have the questions about

1 Mr. Esslinger and Mr. Reyes, and for that matter,
2 Mr. Rios, as well, because Texas and the United States
3 have previously represented they would not be called,
4 and that was the need -- that was why Dr. King and
5 Dr. Blair were necessary. I -- I guess that has
6 changed and so we won't intend to do anything with
7 subpoenas for those. We still have two subpoenas that
8 will be needed, assuming Mr. -- with Mr. Drusina,
9 there's -- there's some question as to whether or not
10 we will call him. That'll depend on the IBWC
11 testimony that we hear from the Texas and U.S. direct
12 case.

13 **JUDGE MELLOY:** All right. But there's
14 nothing I need to do today on that, as I understand
15 that, Mr. Wechsler?

16 **MR. WECHSLER:** That's correct, Your
17 Honor. You had indicated in your trial management
18 order that you wanted to be kept apprised. We're
19 attempting to do that, and we'll simply file a notice
20 as a subpoena is issued, if that's acceptable with
21 you.

22 **JUDGE MELLOY:** That's fine. Then you
23 raised the issue, Mr. Wechsler, stipulated facts. You
24 asked if I would accept stipulated facts. In fact,
25 the trial management order referenced stipulated

1 facts. They were supposed to have been in the
2 pre-trial statement, and it was my understanding you
3 were still working on stipulations. I think we talked
4 about that in one of the status conferences. So where
5 are we on that issue? You -- you indicated you have
6 proposed some stipulated facts, Mr. Wechsler, but it'd
7 gotten no agreement? Is that where we are?

8 **MR. WECHSLER:** Well, Your Honor, there
9 -- we had proposed some. There was some initial
10 reaction. There was a meet and confer amongst the
11 parties, and then we sort of lost the thread. We're
12 hoping to pick that thread back up. Before we do
13 that, we wanted to check with you and ensure because
14 we were aware that that deadline had passed, that you
15 would still allow the parties to do that if we're able
16 to agree to stipulated facts.

17 **JUDGE MELLOY:** That's fine. You know,
18 the more stipulations, the better. As far as the
19 deadline is concerned, I'd say by the -- by the
20 hearing we have next Wednesday, get another week to
21 put them together.

22 Point No. 5, you have authenticity
23 objections. United States hasn't responded. Where
24 are you on that, Mr. Dubois?

25 **MR. DUBOIS:** I'll take the -- the mea

1 culpa on that. We sort of lost the thread on that
2 one, Your Honor, I'm afraid. We will get back this
3 week to Mr. Wechsler on the -- the issues that he has
4 raised.

5 **MR. WECHSLER:** Your Honor, if I may just
6 ask through you, if Mr. Dubois could also -- I'm just
7 wondering, Jim, where we are on the handwriting
8 stipulations.

9 **MR. DUBOIS:** Yeah. I've got that put
10 together, and I -- unfortunately, I got the signature
11 blocks in it on Monday, and other -- other events have
12 sort of swamped me this week. I will get that out to
13 you today. I'll get that out -- excuse me -- to all
14 the states today.

15 **MR. WECHSLER:** Thank you.

16 **JUDGE MELLOY:** Okay. Then going down
17 Mr. Wechsler's list, I think anybody object to his --
18 his -- his request that the realtime transcript not be
19 available to the witness?

20 **MR. DUBOIS:** I think that might be in
21 the actual -- the order already, isn't it, Your Honor?

22 **JUDGE MELLOY:** I think it's -- I think
23 the order says -- let me look at it.

24 **MR. WECHSLER:** Your Honor, it's in
25 Section 2D, as in dog. If it would be helpful, I can

1 read the section. It says, "D, court reporter. The
2 court reporter will provide realtime transcription and
3 make rough drafts available at the end of every trial
4 day. The realtime access code and password will be
5 provided in writing from the court reporter to all
6 counsel from the parties." And so our only
7 clarification is we understand that to be for the
8 parties' use and not the witness, as the witness is
9 testifying.

10 **JUDGE MELLOY:** Okay. That's fine.
11 We'll have that clarification. Okay. And then I
12 understand 7 is for record purposes only that you have
13 not completed your review of Texas' request for
14 additional exhibits. Whether you'll have any
15 objections, you're just reserving your right, as I
16 understand; is that right, Mr. Wechsler?

17 **MR. WECHSLER:** It is.

18 **JUDGE MELLOY:** And then we still have
19 outstanding the objections to the deposition
20 designations. I will get that resolved before next --
21 the hearing next week, but where -- what -- which ones
22 do you understand are still at issue, Mr. Wechsler,
23 the ones you've identified in Sub A?

24 **MR. WECHSLER:** Well, I believe that's
25 correct, Your Honor. I'll -- I'll -- I'll give you

1 the status, as I understand it, and hope -- ask for
2 Ms. Barfield to help me with that. So skipping over A
3 with -- with Barroll, Longworth, Lopez, and Thacker.
4 I understand that for now, those will be withdrawn.
5 Our concern was just the idea that there would be
6 redundant testimony, and Texas has been gracious in
7 trying to address that by withdrawing them for now.

8 **JUDGE MELLODY:** Excuse me a second. Can
9 you hold on a second? Which ones did you say, Thacker
10 and which one?

11 **MR. WECHSLER:** I'm sorry. Let me -- let
12 me go back. It should not include Thacker. Thacker,
13 I think, is done, because as far as I understand, no
14 party is intending to offer Thacker as a witness. Is
15 that right, Ms. Barfield?

16 **MS. BARFIELD:** Ms. Thacker is still on
17 our will -- I'm sorry -- may-call witness list.

18 **MR. WECHSLER:** Fair enough. So I don't
19 -- so, I guess, this would apply to all of those. But
20 Dr. Barroll, Mr. Longworth, and Mr. Lopez are on our
21 will-call list. Our concern with them was there would
22 be redundant testimony and so the stipulation applies
23 to all four of these witnesses, and that is the
24 designations for now will be withdrawn. After the
25 witness has testified, if that witness testifies, then

1 those -- the designation will be offered by Texas at
2 that time, and if we still have concerns about them
3 being redundant and cumulative, we will raise them at
4 that time.

5 **JUDGE MELLOY:** Okay.

6 **MR. WECHSLER:** Is that a correct
7 statement, Ms. Barfield?

8 **MS. BARFIELD:** That's accurate.

9 **MR. WECHSLER:** Then, Your Honor, for
10 Dr. Kryloff, who is -- was a United States historian,
11 the objection, as I understood it from Texas, was the
12 admission of the entire expert report, which was a
13 deposition designation, and New Mexico and -- and
14 Texas are currently talking about paring that down
15 significantly so the deposition designations can be
16 understood in light of the report and the parts of the
17 reports will be admitted, but we haven't reached
18 agreement on whether that's acceptable and what part,
19 but we propose to you that we continue to have that
20 discussion, and if it needs to be raised in the
21 future, then we will raise it at that time.

22 **JUDGE MELLOY:** Okay.

23 **MR. WECHSLER:** Which leaves, I believe,
24 the only ones that need to be resolved, Mr. Rios, I
25 understand, is now testifying live, so we'll withdraw

1 that designation, and so that leaves Mica Heilmann,
2 Dr. Lombardini, and Mr. Settemeyer. So as a reminder,
3 Ms. Heilmann and -- and Dr. Lombardini were Texas
4 designated experts, and Mr. Settemeyer was now retired
5 formerly the engineer advisor for Texas to the Rio
6 Grande Compact Commission.

7 **JUDGE MELLOY:** All right. Well, let me
8 take a look at those, and I will resolve those before
9 the next hearing. Does anybody wish to be heard on
10 any of those three designations?

11 **MS. BARFIELD:** Yes, Your Honor, if I
12 could briefly be heard. And -- and the purpose is
13 because this particular issue was raised by New Mexico
14 by way of a request submitted at the same time as the
15 pre-trial statements that they designate these
16 portions of the depositions, so it has not been
17 briefed. It has not been addressed by us in writing
18 in our pre-trial statement within the depo designation
19 section. So in terms of Texas' position, I just want
20 Your Honor to be clear that we do not object to New
21 Mexico calling these witnesses live where those
22 witnesses would be subject to cross-examination by
23 Texas or other parties. Our objection is essentially
24 being forced into submitting testimony by way of the
25 designations. We do request the right to

1 cross-examine these witnesses and think that we're
2 entitled to cross-examine these witnesses, in
3 particular pursuant to Section 4 of the TMO. Section
4 4 is premised on the idea that the parties would agree
5 to submit a witness via deposition designation as
6 opposed to live testimony. We request live testimony.
7 Now, whether that's by way of Texas calling these
8 witnesses or by way of New Mexico calling these
9 witnesses, either way, if they're going to testify, it
10 should be live. That's our position.

11 **JUDGE MELLOY:** Do you want to respond,
12 Mr. Wechsler?

13 **MR. WECHSLER:** Yeah. My response is, I
14 guess, three-fold. I mean, first, these are Texas
15 witnesses. I mean, they had the opportunity to ask --
16 to present them. They're electing not to do that.
17 They obviously had opportunity to ask questions at the
18 deposition, also chose not to. Secondly, it's simply
19 more efficient. I mean, as you know, there are time
20 constraints that you have placed, and there's a
21 limited amount of testimony for these witnesses, as
22 you, yourself, have encouraged the parties to include
23 deposition designations and to think of alternative
24 ways to present testimony, and that's exactly what
25 we're doing. We're trying to be as efficient as

1 possible.

2 Secondly, we do not read the trial
3 management order, Section 4, to require agreement of
4 the parties. There is a meet-and-confer provision to
5 try and work out disagreements, but I don't think that
6 that is necessary.

7 And, finally, there's simply no
8 prejudice to Texas and the United States to being
9 allowed to present these deposition designations now.
10 Again, they're their witnesses. If they want to
11 present them, they certainly can.

12 **JUDGE MELLOY:** Well, let me take a look
13 at it, and we'll get something out before next week.

14 All right. I know you're getting close
15 to submitting your witness lists for -- and time
16 estimates. What do you think the -- the time
17 requirement will be for this phase of the trial?
18 Assuming a four-day week, how many weeks.

19 **MR. WECHSLER:** So, Your Honor, we -- I
20 unfortunately don't have it in front of me. We did
21 include a build out of that with the four-day
22 schedule, including previous estimates from the
23 parties about the amount of direct and then estimates
24 from New Mexico about the amount of cross, including
25 cross of New Mexico witnesses. Our anticipation is

1 that would last until -- given the week off of October
2 25th and the four-day week, it would last until
3 approximately the second week of November.

4 **JUDGE MELLOY:** Anybody seriously
5 disagree with that? So that would be roughly five
6 weeks of testimony?

7 **MR. WECHSLER:** I think that's correct.

8 **JUDGE MELLOY:** Four weeks in October,
9 including the last week, and then -- okay. All right.
10 Then you asked about a trial date for next spring. I
11 suppose we should go ahead and do that so everybody
12 can plan accordingly. I would suggest we look at
13 starting Monday, March 14th. Does anybody have a
14 problem with that? If not, we'll -- that'll -- we'll
15 set that date.

16 All right. Then we have the -- the
17 letter from Mr. Wallace. Do you want to speak to what
18 your request is there, Mr. Wallace, to see if there's
19 any objection?

20 **MR. WALLACE:** Yes. Thank you, Your
21 Honor. The intent of the letter was really to provide
22 clarification to Your Honor and the other parties
23 about Colorado's level of participation. We have
24 listed previously in Trial Management Order, witnesses
25 as may-call, and we're clarifying that we have no

1 intent to call witnesses. We don't see at present
2 that this case will have any impact on Colorado, but
3 what we want to do is be able to reserve the right to
4 present evidence on rebuttal if after the close of
5 both phases of the case, we find that something does
6 come up that, in fact, could impact Colorado's rights
7 and obligations. So we don't want to jettison our
8 ability to say something to the Court and clarify
9 something or defend our interest, but at this point,
10 we don't think it's necessary to put on a case in
11 chief to do so.

12 **JUDGE MELLOY:** Does anybody have a
13 problem with that?

14 (No response.)

15 **JUDGE MELLOY:** All right. Hearing no
16 objection, we'll take it as that's the agreement,
17 Mr. Wallace.

18 There's one other issue I want to
19 discuss, but I'm -- unless there's any serious
20 objection, I think I prefer to discuss it just with
21 the parties, the named parties, and that's the issue
22 dealing with mediation and a mediator, and I have a
23 couple thoughts, but I think I -- rather than do it in
24 the larger group, if there's no objection to -- and
25 certainly I -- it's not confidential in the sense I'm

1 going to ask the main parties not to relay my comments
2 to -- to the amici, but I think I'd like to talk to
3 the main parties separately, if that's -- unless
4 there's any serious objection to that. And if -- if
5 that is agreeable, I'd just ask probably the easiest
6 way would be just to ask other people to drop off, and
7 we'll -- we'll talk about that for a few minutes. But
8 before I do that, is there anything else we need to
9 take up this morning?

10 **MS. BARFIELD:** Your Honor, this is
11 Theresa Barfield on behalf of Texas. I do want to
12 raise one additional issue with respect to the exhibit
13 list. Texas did send a letter to Your Honor yesterday
14 requesting leave to file an amended final exhibit
15 list, which is required by the pre-trial order for us
16 to request that leave and be granted that leave. We
17 did briefly address, you know, Mr. Wechsler's point
18 about exhibits in his e-mail. That is a separate
19 issue, though, Your Honor, so I didn't want to leave
20 this call today without addressing the letter that we
21 sent. A brief summary of what we're requesting to do
22 is add the additional drone footage that Ms. Klahn
23 discussed earlier to complete the list of -- well, the
24 work that was done with the drones. We need to add
25 approximately ten documents to the final exhibit list

1 that were not included in this CSV file exchange. We
2 realized that issue this week. Four of those are for
3 use in the fall trial setting. The rest are related
4 to the spring trial setting, and the four that are for
5 use until the fall trial setting are historical
6 documents for use with the expert historian that the
7 parties do have and will exchange during discovery.
8 These are not new documents. They just need to be
9 formally added to our list by way of an amendment.

10 The other issue is there are items
11 identified in the CSV file exchange that need to be
12 assigned a unique trial number as opposed to waiting
13 until the five-day exchange of the exhibit list. It
14 makes sense to do that now. So with Your Honor's
15 permission, we would like to serve that updated list
16 this week.

17 **JUDGE MELLOY:** What's your position,
18 Mr. Wechsler, or is that what you're still looking at?

19 **MR. WECHSLER:** I think as Ms. Barfield
20 indicated, we're looking at the ones that were
21 previously disclosed. I -- I didn't fully follow Ms.
22 Barfield. I think the details, though, we can likely
23 work out. I mean, I understand there might be
24 additional exhibits they're wanting to add. We don't
25 have a problem with that so long as we preserve our

1 right to object to those exhibits and raise issues
2 with Texas, which I'd hope we'd be able to work out.

3 **MS. BARFIELD:** And we agree with that.

4 **JUDGE MELLOY:** All right. Well, I'll
5 grant the leave to file the list subject to any
6 objections on any -- any grounds that New Mexico may
7 have to the admission of the exhibits at the time that
8 Texas moves their admission.

9 **MS. BARFIELD:** Thank you, Your Honor.

10 **JUDGE MELLOY:** Anything else?

11 **MR. WALLACE:** Your Honor, this is Chad
12 Wallace. I just wanted to make sure that the parties
13 had not missed in the letter, Colorado did also want
14 to intend to reserve the right to cross-examine as
15 necessary. We feel that that might also help put off
16 any need for rebuttal case at all. If -- with
17 witnesses and other parties bring forward bring up an
18 item we might clarify in cross, I think it might be
19 more efficient to do it then rather than wait and
20 perhaps not even need a rebuttal case. I just wanted
21 to clarify that.

22 **JUDGE MELLOY:** All right. Do you or
23 someone from your office, Mr. Wallace, think you'll be
24 participating in the entire trial or will there be
25 witnesses where you may not -- you may just wait to

1 see what the transcript says?

2 **MR. WALLACE:** At this point, especially,
3 Your Honor, because we're doing it remotely, we'll
4 have somebody participate.

5 **JUDGE MELLOY:** And -- and, again, I --
6 my -- and I'll maybe ask Pete at Worldwide to chime in
7 on this, make sure I understand correctly. Pete, as I
8 understand, Worldwide will have a record every day of
9 who joins -- who -- who participates, and that would
10 be available -- or maybe actually -- maybe we'll have
11 it filed, but that'll be available for review; is that
12 correct?

13 **VIRTUAL MONITOR:** That's correct.

14 **JUDGE MELLOY:** Okay. So my intent is --
15 is not to go through like we did this morning or have
16 done for all the other hearings every single person
17 who's on the call. I'm only going to take the
18 appearances for the parties and the -- and the witness
19 and, of course, I'll be there. So really there will
20 only be the six, and then we'll have a record of -- of
21 who is on the call or who is participating from
22 Worldwide. And I certainly would envision that there
23 may very well be observers who come in late, leave
24 early, find it pretty boring and decide that an hour
25 of this is enough, and they're not necessarily going

1 to be here for the whole day, but we'll know that from
2 Worldwide, and they'll have those records available if
3 we ever wanted to find out who was observing the
4 trial. Is that -- any question about that?

5 (No response.)

6 **JUDGE MELLOY:** And I would add like in
7 the case of, say, El Paso or Elephant Butte Irrigation
8 District, if there's an attorney who's not in the room
9 with the witness who wants to be on video when their
10 witness or their employee testifies, certainly that's
11 something they could ask leave to do for that
12 particular witness. I suspect in some cases, the
13 witness may be in their office, and they may be in the
14 same room, but if they're not, that's -- I'm certainly
15 open to allowing the attorney for the witness, who's a
16 non-party, to be on -- on the video, as well. Well,
17 if there's nothing further, I'd just ask the parties
18 to stay on. Everybody else drop off, and I do want to
19 talk about the mediation just a little bit if I could.
20 While they're doing that, I'm going to mute this.

21 (Break.)

22 **JUDGE MELLOY:** What I wanted to just
23 visit with you for a minute about was this issue of
24 mediation. Have you thought about a mediator any
25 further? Have you made any progress in that regard?

1 You're nodding, Mr. Wechsler. Do you have anything
2 you want to say?

3 **MR. WECHSLER:** I'll actually allow
4 Ms. Khoury to talk about this, who's really been
5 taking the lead on the mediation for New Mexico.

6 **MS. KHOURY:** Thank you, Mr. Wechsler.
7 Your Honor, yeah, I believe that I am safe to say that
8 we have made progress on at least agreeing to a
9 mediator. Ms. Hubenak and the Texas office of the
10 attorney general and myself have been closely
11 communicating, and it -- it appears that we have
12 agreed to Judge Boylan as our mediator. We have
13 tentatively booked the dates beginning in December
14 with Judge Boylan.

15 **JUDGE MELLOY:** Okay. The reason I bring
16 this up is I really didn't inquire, and in some
17 respect, don't really need to know what your problem
18 was with the prior mediator, but I don't know if you
19 want a different -- if it's a different approach, you
20 want more aggressive, less aggressive, but do you --
21 you feel comfortable with Judge Boylan has -- has
22 whatever skills you need or hopefully has the skills
23 you need to address that issue?

24 **MS. KHOURY:** For New Mexico. And I -- I
25 don't intend to speak for the other parties, Your

1 Honor, but for New Mexico, we're hopeful that Judge
2 Boylan will bring a different approach and potentially
3 be more successful.

4 **JUDGE MELLOY:** Okay. I was going to
5 throw out one other option, and if you -- I don't want
6 to confuse the issue any more than already, but when
7 you had raised the issue of did I know of a mediator,
8 one of the things I did was I called a district judge
9 here in Iowa, who was a magistrate judge when I was
10 district judge. We served in the same district. He
11 had done hundreds of mediations very successfully as a
12 magistrate judge. He's now been a district judge for
13 12, 13 years and has not done a lot of mediation as a
14 district judge. But I called him to see if he knew of
15 some real good people, and in the course of the
16 conversation, indicated that he'd be willing to do it.
17 I -- I don't know if that's something that would
18 interest you if you want to pursue it any further.
19 And he would be available just about any time,
20 obviously be a lot cheaper, and -- I have ran it by
21 the clerk of the Supreme Court. He thinks it'd
22 probably be okay. He wants to kind of think about it
23 a little bit more, but that's an option if you decide
24 you want somebody quicker. I can certainly get you
25 more information, but just to let you know, that is an

1 option. He does have a good reputation as a
2 magistrate judge, but like I say, he hasn't done a lot
3 of it the last 12 or 13 years as a district judge.
4 But he is available. He's actually going to retire in
5 March so he's winding down his caseload in
6 anticipation of retirement. He'll probably go into
7 full-time mediation in March so if you don't get it
8 done by then, you will have to start paying him. But
9 -- but that would be -- that is an option I just
10 wanted to throw out there, if you want to think about
11 it or talk about it and get back to me on that. But
12 if there's nothing further -- I didn't know I didn't
13 necessarily -- thought it was any reason we couldn't
14 talk about this with everybody else, but I didn't know
15 if there was anything about the prior mediator that
16 would be uncomfortable or whatever with -- with -- for
17 anybody but -- but any -- anything further on that?

18 (No response.)

19 **JUDGE MELLOY:** All right. Then if not,
20 we'll see everybody next week. Thanks, everyone.

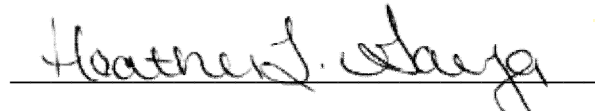
21 (The proceedings adjourned at 12:13
22 p.m.)
23
24
25

CERTIFICATE

I, HEATHER L. GARZA, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that the foregoing pages comprise a true, complete and correct transcript of the proceedings had at the time of the status hearing.

I further certify that I am not, in any capacity, a regular employee of any of the parties in whose behalf this status hearing is taken, nor in the regular employ of any of the attorneys; and I certify that I am not interested in the cause, nor of kin or counsel to any of the parties.

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